No. 87-514

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JAMES L. HOOPER, ET AL.,

Petitioners,

v.

STEPHEN H. SACHS, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Did the courts below correctly hold that insufficient evidence exists showing a violation of petitioners' Fourth Amendment rights?

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COUNTERSTATEMENT OF THE CASE

Petitioners James L. Hooper and Deer Park Medical Group, P.A., filed this action pursuant to 42 U.S.C. §1983 seeking monetary relief from defendants (now respondents) Maryland Attorney General Stephen H. Sachs, Assistant Attorney General Dale P. Kelberman,

and Chief State medicaid fraud investigator Andrew J. Tartaglino, alleging that defendants violated petitioners' Fourth Amendment rights by using a private individual, Dr. Cheryl Winchell, to illegally search and seize petitioners' medical records. (App. at 2.)[1/]

The United States District Court for the District of Maryland granted defendants' motion for summary judgment, holding that after "having reviewed all of the relevant materials, . . . there is insufficient evidence to allow reasonable inferences to be drawn that Dr. Winchell . . . was acting as the agent of the State or, even assuming that she was, that she would not have done the same thing in any event." (App. at 119.)

The United States Court of Appeals for the Fourth Circuit, in an unpublished per

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1/ Citations in the form of "App. at __" are to the appendix to the petition for writ of certiorari.

curiam opinion, affirmed. The Fourth Circuit held that "[t]he record is devoid of any direct evidence that the MFCU personnel [defendants] encouraged Winchell to obtain information for them, and [petitioner] Hooper offered no more than speculation and conjecture to support that position." (App. at 6-7.) The petition to this Court followed.

REASONS FOR DENYING THE WRIT

The Petition Does Not Present A Single Substantial Federal Question

The courts below recognized this case for what it is: totally lacking in merit. Further review of this case is plainly unwarranted. The petition presents no novel or unsettled questions on which the lower federal courts require the guidance of this Court. The decisions below conform with prior recent decisions of this Court, and there is no reason existing for this Court to exercise its discretionary certiorari juris-

diction to review and then affirm this factually unique and legally unremarkable case.

Citing United States v. Jacobsen, 466 U.S. 109, 113 (1984), the Fourth Circuit agreed with the district court that "no genuine issue of material fact existed because [petitioner] Hooper had not presented sufficient evidence to establish that Winchell might have been a government agent, a necessary element for a Fourth Amendment violation." (App. at 5-6.) Indeed, the court of appeals noted that although the deposition testimony of Dr. Winchell and the affidavit testimony of Messers. Kelberman and Tartaglino indicated that Dr. Winchell was "neither directed nor encouraged" to obtain additional documents, Dr. Hooper offered only "speculation and conjecture" to the contrary. (App. at 6-7.) On these undisputed facts, the district court quite properly entered judgment in favor of defendants.

That decision is in complete accord with two recent decisions of this Court setting forth the controlling summary judgment principles. In Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986), which petitioners do not even cite in their petition, this Court stated:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

106 S.Ct. at 2552-53.

Further, this Court noted, the moving party does not bear a burden of producing evidence "showing the absence of a genuine issue of material facts, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, . . . the burden on the moving party may be discharged

by 'showing' - that is, pointing out to the District Court - that there is an absence of evidence to support the nonmoving party's case." 106 S.Ct. at 2554.

In Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505 (1986), decided the same day as Celotex Corporation, this Court explained what the nonmoving party must show in order to successfully oppose a motion for summary judgment. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." 106 S.Ct. at 2510 (emphasis in original). This Court stated further that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly

probative, summary judgment may be granted." 106 S.Ct. at 2511 (citations omitted).

Accordingly, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." 106 S.Ct. at 2512.

Defendants met fully their burden of showing there was no genuine issue of material fact. Petitioners' only response is that "summary judgment should not be awarded when an issue turns on credibility," Petition at 15. This Court in Anderson nevertheless held that even where "state of mind is at issue and the jury might disbelieve [the defendant] or his witnesses as to this issue," 106 S.Ct. at 2514, this does not relieve the nonmoving party of setting forth specific facts showing there is a genuine issue for trial:

> As we have recently said, "discredited testimony is not [normally] considered a sufficient basis for drawing a contrary conclusion." Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 512, 104 S.Ct. 1949, 1966, 80 L.Ed.2d 502 (1984). Instead, the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff had had a full opportunity to conduct discovery.

106 S.Ct. at 2514 (emphasis added). See also First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 288-90 (1968).

Although petitioners have had their "full opportunity to conduct discovery," they presented no evidence in support of their claims. Thus, the district court concluded -- and properly so -- that their "position is on the line in which inference is piled upon vague or ambiguous inference, which . . . is insufficient to support an opposition to summary judgment." (App. at 114.) The Fourth Circuit agreed. Further review is plainly unwarranted.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Date: October 23, 1987